PRESENT STATUS OF WORKMEN'S COMPENSATION LAWS

By Walter George Smith,
President, Conference of Commissioners on Uniform State Laws,
Philadelphia.

In a recent address before the Pennsylvania Council of the National Civic Federation, John Mitchell summarized in a striking manner the statistics of death and injury to workmen in industrial employments in the United States. He said:

"It is safe to say that the greatest calamity that can befall the family of the wage-earner is to have the father and bread-winner carried lifeless into his home, and the shock of this calamity comes with added force when the death is due to an industrial accident. And yet we are informed on the very best of authority that this tragedy is enacted in the United States more than 100 times each day, more than 35,000 times each year."

And he adds:

"It is not at all to the credit of our country that so many of our wage-earners suffer death and injury in the peaceful conduct of our industries, when in other countries we find that the number and proportion of the killed and injured is almost three times less than in our own. William Hurd, the well-known writer, makes the statement that 536,165 working men are killed or injured every year in American industries, and Dr. Hoffman, statistician of the Prudential Life Insurance Company, has estimated the annual number of industrial accidents at approximately 2,000,000. Of these 35,000 were killed and the others were injured. In the Pennsylvania coal mines alone 1,073 men were killed last year and 2,160 were seriously injured."

For years the American people have borne this evil, if not with equanimity, at least with patience, in the belief that it was a necessary incident in modern progress, and the lives that were taken and the injuries that were inflicted were inseparable from the conditions of modern life. Meantime, however, European peoples have been studying the subject, and as early as 1883 the

German Empire solved for itself the problem of insuring workmen against industrial accidents and had provided also for disability arising from sickness, old age and invalidity. An accident law was passed July 6th, 1884, including generally the industries utilizing mechanical power. Agriculture and forestry were added later, and still later building operations and marine transportation, in 1887. Invalidity and old age insurance laws were enacted in 1889.

The characteristic feature of the German system is compulsory mutual insurance, an insurance carried by mutual associations of employers in the same or allied industries and without contributions by the employees.

"Each employer contributes to the cost according to the size of his establishment, that is, the amount of his pay roll and the risk in his particular branch of the industry. In some cases individual establishments where many accidents occur are charged an extra premium." [1]

It would be very interesting to trace in detail the origin and development of the German system, but this has been well done in other papers, and it is only necessary for the present purpose to refer to it as showing how an effective system can be devised and put into practice where constitutional difficulties do not interfere.

"Surveying the political setting of the German insurance system," says Carman F. Randolph, "we find what at the moment is perhaps the fairest field in the world for the working out of a vast and complicated scheme for relieving misfortunes by a plan, neither so niggardly as to be delusive, nor so bountiful as to be demoralizing. Here is a people enjoying in a large measure the steadying influence of tradition and custom, yet alive with a youthful enterprise which has brought a sudden and a great prosperity.

"In short, the German insurance system flourishes in a peculiarly fit environment—a well-disciplined, or, as we should say, an overgoverned community." [2]

In England every employer must provide compensation for injury to his workmen for any accident arising out of or in course of the employment, unless the accident was due to serious or wilful

[1] Report of Massachusetts Commission.

[2] Brief on the Legal Aspects of Systematic Compensation for Industrial Accidents, Carman F. Randolph, New York, 1911.

misconduct of the workmen, and even then in the case of death the employer must pay. Compensation is also provided when death or disability results from certain industrial diseases. This has been the law since July 1, 1907. The burden is borne directly by the individual employer, as no method of insurance is provided for or required by law.

In Norway employers in certain lines of industry are compelled to provide accident insurance for their employees. Insurance must be taken from a central insurance office of the state, the expenses of which are met by general taxes, and premiums are charged in accordance with the risk in each line of industry.

The Massachusetts Commission reports:

> That nearly thirty countries and self-governing colonies have largely done away with the old laws of liability based upon the fault or negligence of the employer, which were not essentially different from those now in operation throughout the United States. Under one form or another these countries have adopted new methods providing for the victims of industrial accidents by means of fixed scales of compensation largely irrespective of negligence. These new laws are not intended to be punitive in any sense, but are founded on the principle that the whole community for which production is carried on should bear the burden of all the costs of production; in other words, that the cost of an industry in life and limb should first be met by the employer or by some system of insurance, and then charged against society as consumers of the product, in the same way as the depreciation of machinery and other costs of production are provided for. No two countries have precisely the same method of distributing this burden or of providing for the victims; but all the different plans are modifications or combinations of three distinct systems, which are typified by the compensation act of Great Britain, the compulsory mutual insurance system of Germany and the compulsory state insurance of Norway.[3]

It would seem, therefore, that almost all civilized countries have, to some extent at least, made provision whereby the community bears a part of the industrial loss resulting from the casualties among workmen in the scope of their employment. This has been by applying the principle of insurance or mutuality so as "to reduce the individual catastrophes that destroy into a dust cloud of accidents that distributes itself." [4]

The sentiment in favor of providing for workmen's compensation and kindred legislation has been traced by Professor Dicey

[3]Report of Massachusetts Commission.
[4]Frederic Passy, quoted by Randolph, p. 31.

to that principle of collectivism which, following the era of Benthamism, owes to it a maxim that has been one of its strongest aids, namely, the idea of "the greatest good to the greatest number." [5] Thus he says:

"A line of acts begun under the influence of Benthamite ideas has often, under an almost unconscious change in legislative opinion, at last taken a turn in the direction of socialism. A salient example of this phenomenon is exhibited by the effort lasting over many years to amend the law with regard to an employer's liability for damage done to his workmen in the course of their employment. Up to 1896, reformers, acting under the inspiration of Benthamite ideas, directed their efforts wholly towards giving workmen the same right to compensation by their employer for damage inflicted through the negligence of one of his workmen as is possessed by a stranger. This endeavor was never completely successful; but in 1897 it led up to and ended in the thoroughly collectivist legislation embodied in the Employers' Liability Acts, 1897 to 1900, which (to put the matter broadly) makes an employer the insurer of his workmen against any damage incurred in the course of their employment." [6]

It has been a subject of reproach on the part of some impulsive leaders of public thought that the United States has been so slow in showing in its legislation the effect of this collectivist sentiment, but the explanation is not difficult. In all European countries constitutional restrictions are far slighter than in our own. In England, there being no written constitution, the power of Parliament to legislate in any given direction as the pressure of public sentiment is brought to bear upon it, is practically without limit. In Germany and in Norway, to take the typical examples of European systems already referred to, conditions social and political are vastly different from those in the United States.

Although each of the states is a separate entity and has the power within certain limits to pass workmen's compensation laws, the limits are narrow by reason of the written constitutions, and if their limitations are heeded and legislation is perfected that will be sustained by the courts, there will remain the business question whether the industries of the state will be so burdened as to

[5] Law and Opinion in England, p. 309.
[6] Law and Opinion in England, p. 69.

make them unable to bear the competition of the industries of other states where less onerous laws are enforced. Here as in so many other instances our form of federal government presents difficulties for the law and social reformer for which he can find no precedent elsewhere. Yet, of course, political constitutions are made for men, not men for constitutions, and if the changing conditions of modern civilization make it necessary they will be interpreted or amended so as to meet those conditions.

Both the humanitarian sentiment which, whatever else may be said to the discredit of our generation, is one of its crowning glories, and the demands of business expedience require that some way should be devised whereby, applying the principle of insurance, the heavy loss from industrial accidents may be, to use the fine expression of the French philosopher, "scattered into dust clouds."

The present system, under which employers are liable under certain conditions for accidents to workmen, have led them to insure their risks, and there are many employers' liability companies in the United States. Mr. Mitchell, in the address from which quotation has been heretofore made, states that during the eleven years from 1894 to 1905, these companies were paid $99,595,076 in premiums, and that forty-three per cent, or $43,599,498 of this amount was paid in setlement of the claims of injured workmen. How much of this vast payment after the deduction of counsel fees and court costs finally came into the hands of the workmen is only a matter of estimate, but it would appear that less than one-third, or $30,000,000 out of $100,000,000 in round numbers was finally received by the workmen. Obviously, there is an enormous waste and it should be saved if it be possible to save it.

The temper of many thinkers towards the limitations imposed by the existing common law rules relating to industrial accidents is well expressed by the Supreme Court of Kansas:

> The common law doctrine of reasonable care, assumption of risks, contributory negligence, and co-service took their rise at a time when shoes were made at the bench, the weaver had an apprentice or two, and the blacksmith a helper. Steam and electricity have revolutionized manufacturing conditions so marvelously that no vestige of former conditions remains. But while the factory worker's environment has completely changed, his common law rights and remedies have remained unchanged. It has been well understood for a long time that there is no justice or economic excuse for this state of affairs. The liberty of capital to conduct its business in its own

way does not include the right to inflict cruelties which have invariably characterized industrial progress. The liberty of the wage earner to contract for extra pay for extra hazard and to seek some other employment if he does not like his master's methods is a myth, or as has been said, "a heartless mockery." (Kilpatrick *vs.* Grand Trunk R. R. Co., 74 Vt. 288 xxx.) The man and the machine at which he works should be recognized as substantially one piece of mechanism, and mishaps to either ought to be repaired, and charged to the cost of maintenance.[7]

Various acts have been passed by the legislatures of different states modifying the severity of the common law rule that no damages were payable when the accident was caused by the fault of the injured workman or of a fellow servant, or from the unavoidable risks of the employment.

"The practical effect of these laws," says Mr. P. T. Sherman, "has been to increase the uncertainty as to liability, litigation and the expense to employers but to waste in litigation the money paid by the employers without any material increase in the relief to the injured and to leave that relief just as slow and uncertain as before. In theory these laws are wrong, because they make the employer liable in damages for a wrong where he has been guilty of no wrong, and thereby they serve to stir up a sense of mutual wrong between employers and employees."[8]

Various efforts are being made to meet the admitted evils of the common law on the subject of employers' liability and its effect upon workmen in all departments of labor, and to discover the proper rules to adopt in reaching a just standard of compensation for accident and death within constitutional limitations. Plans are now under consideration in many states and statutes have been passed by Congress and by some of the states. The first federal legislation on the subject of employers' liability was restricted to common carriers engaged in interstate commerce, and recently two liability bills, one restricted to the Isthmian Canal and one applying to all laborers of the United States Government were introduced by the Congress. The decision of the Supreme Court of Connecticut that the Federal Liability Law of April 22, 1908, is unconstitutional, because it involves the administration of the law in state courts and affects matters beyond the scope of interstate

[7]Caspar *vs.* Lewin, 109 Pac. Rep. 657, U. S. Bulletin of Labor (1910) p. 846.

[8]Address before National Civic Federation, January 13th, 1911.

commerce, is now pending on appeal in the Supreme Court of the United States. Other constitutional objections have been raised in other jurisdictions and are also pending on appeal.

In Montana a law is in operation providing a co-operative insurance fund for miners and mine laborers, payments to be made by the employers, computed on the basis of tonnage mined and shipped, held for shipment or sold locally, and by the employees on the basis of gross monthly earnings. Insurance is compulsory, the funds being administered by state officers. Death benefits are limited to $3,000; the right to sue is not taken away, but bringing suit forfeits all rights under the insurance, and on the other hand acceptance of insurance benefits is a waiver of the right to sue.[9]

While statutes providing for compensation have been enacted in the Philippine Islands and by Congress for certain special employments, the subject may be considered as practically an open one in the United States, and has been or is being considered by commissions under an act of Congress, as well as by state commissions in Massachusetts, New York, Illinois, Connecticut, Wisconsin, New Jersey, Ohio, Minnesota, Montana, West Virginia and Washington. In only one state (New York) has a comprehensive statute on the subject been enacted. This has just been decided to be unconstitutional by the Court of Appeals.

There is a general unanimity of opinion as to the object to be attained but a great divergence of views as to the best method of attaining them. In the report to the House of Representatives of the bill for the appointment of a commission a summary of the reasons for changing the existing system is given as follows:

> One of the most pressing problems of interstate commerce that to-day demands the attention of Congress is that of wisely and equitably adjusting the loss to workmen of life and earning power which is the certain and inevitable consequence of modern methods of transportation.
>
> The existing system, based upon the common law, circumscribed by the rigorous limitations placed upon it by judicial decisions, is entirely inadequate and had its origin in conditions of employment and methods of operation long since outgrown and abandoned.
>
> The basis of that system, briefly stated, is to place a legal liability upon the employer to the workman for the loss of life or for disabling injury wholly upon the ground of negligence of the employer, and to put upon the person injured the burden of establishing that negligence by competent legal proof.

[9]See article by L. D. Clark, Bulletin of Bureau of Labor, Washington, 1910.

Judicial decision has specially limited the common law of negligence when it is applied to employees by the fellow servant doctrine and the assumed risk doctrine. Under these doctrines accidents caused by fellow servants, though necessarily numerous under modern conditions, are uncompensated; and accidents caused by dangers inherent in the occupation itself are likewise uncompensated, although such dangers steadily increase as the industry develops.

The general principle of liability is seriously and sometimes fatally restricted by the superadded limitation of contributory negligence.

Finally, as the burden of legal proof rests on the injured, even where the decisions entitle him to a "right of recovery," he is unable to "secure his proofs," and so frequently redress is lost.

Employees to-day bear both the physical and financial loss in a large percentage of accidents, with disastrous effect upon their families. Employers, though endeavoring to conduct their business with care, are harassed by a constant succession of suits for negligence, being subjected to great waste of energy and money in defending them, and being mulcted with large verdicts when they have no real moral blame.[10]

In the opinion of competent authority the effort to secure the passage of a workmen's compensation act by the federal government, excepting so far as it would relate to territory within its exclusive jurisdiction, is doomed to failure. A workmen's compensation system "should involve a single authority over employers and employees and a single classification of accidents and of compensation rates," and "if, after all, Congress should succeed in confusing the situation to the extent of its power, the great bulk of accidents will still remain within the exclusive jurisdiction of the several states."[11]

The predominant thought of those who are seeking to provide a compulsory system of compensation is that the state has the right to regulate and provide conditions for the carrying on of dangerous industries. This was the view of the New York Commission, and since the right to regulate such industries is inherent in the state, it would follow that they might be compelled to submit to a system of compulsory insurance or other method of compensating an injured workman. It is insisted, however, that this theory is too broad, excepting insofar as it affects the power of incorporation; but even here it is not probable it can be carried to the point desired by those who seek to make the employer fully liable while he has not been guilty of negligence. It is agreed, and indeed it

[10]U. S. Bulletin Bureau of Labor, 1910, p. 681.
[11]Randolph's Brief, pp. 84, 85.

has been settled by judicial authority, that the right to carry on any business or trade does not include such as are assumed to affect public policy as expressed in statutes regulating or prohibiting traffic in liquor, lotteries or kindred subjects, but the mere fact that an employment is dangerous is not of itself any reason why its exercise should be forbidden or the conditions so changed as to differentiate the employers' liability.

The New York Compensation Act went into effect September 1, 1910. It applied to certain dangerous employments which were enumerated and gave a scale of compensation for injuries and for death. It did not repeal the common law or disturb the rights of the employee or the employer under the existing law of the state, but gave to the employee the right of election to bring suit under any existing law or to claim compensation under the act itself.

In order perhaps to make more attractive the provisions of the compensation act, New York also passed an employers' liability law, making the employer responsible for defects in his plant and for the negligence of any person in his service entrusted with superintendence or authority to direct the employees, and likewise for injuries sustained by the employees of an independent contractor or sub-contractor. The employer under this law is made liable for injury to the workman caused in whole or in part by:

"(a.) A necessary risk or danger of the employment or one inherent in the nature thereof, or

"(b.) Failure of the employer of such workman or any of his or its officers, agents or employees to exercise due care or to comply with any law affecting such employment provided that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the serious and wilful misconduct of the workman."

Mr. Sherman pointed out the great constitutional difficulty to lie in the question whether or not compensation may be restricted to the more dangerous industries. "Due process of law requires," as he says, "that the employer shall be made liable only according to some reasonable principle of private justice, or—under the police power—pursuant to some reasonable public necessity."

The majority of the committee of the National Civic Federation for which he spoke, thought that there was no question as regards hazardous enterprises as to due process of law; that

under our constitutions the power remains in the state to regulate the relation of master and servant, but the danger was anticipated that a law limited in its application to the more hazardous industries would constitute an unreasonable discrimination between persons or classes; and it has been so held.[12] The weight of opinion seems to be, however, that incidental and unavoidable discriminations resulting from a reasonable classification by industries do not constitute unreasonable discriminations.[13]

As regards the argument that the state's authority to regulate the relations of master and servant gives complete control of the subject of compensating workmen, it has been acutely remarked that this would tend to assimilate the commercial relation to the family bond. It certainly would seem a strained construction of the law governing master and servant, which undoubtedly is within the constitutional powers of the state, to make it apply to the compulsory payment of compensation for accidents.[14]

No scheme for workmen's compensation would seem possible unless it contains some just and reasonable measure for insuring the risk, for it is obvious that an accident which in a large establishment with a heavy capital might readily be borne by the employer, would prove ruinous to the small manufacturer. It is of importance therefore to decide what plan of insurance for distributing the risk may be adopted. It has been well shown that any scheme of compulsory association of manufacturers such as existed in Germany, with enforced contribution to a common insurance fund, is unconstitutional, and as insurance companies are private commercial agencies, the legislature cannot prescribe insurance in them nor contributions to a mutual insurance fund, because this would "impose upon independent employers unconstitutional responsibilities in respect of each other's misfortunes and delinquencies as these affect each other's servants."[15]

The objections that have been touched upon in the references made in the foregoing pages are only part of those that may be found treated at length in various able papers and briefs upon this subject. The conclusion reached by Mr. Randolph is that work-

[12]Ives *vs.* South Buffalo Crosstown Railway Co.

[13]Sherman's address to Civic Federation, Chicago *vs.* Westby, 178 Fed. Rep. 619; L. & N. R. R. *vs.* Melton, 218 U. S., 36.

[14]Randolph's Brief, p. 93 *et seq.*

[15]Randolph's Brief, p. 109.

men's compensation cannot be made exclusively a remedy, but that in many, if not all, of the states "the slow and costly process of suits at law" will be injected into a scheme "where a speedy and cheap procedure is of prime importance." He emphasizes an additional obstacle to the success of any scheme, and that is "a widespread uncertainty and unbelief as to the validity of its very basis —masters' responsibility for injury regardless of fault,"—and insists that "a master's responsibility can no more be made to depend on the nature of his industry than on the size of his bank account. Whether the employment be safe, hazardous or extra hazardous, injury to the servant is the vital fact—the inevitable point of departure for all legal reasoning. In short, if the principle of compulsory compensation is constitutional it must, potentially, be applicable for the benefit of any servant and imposable upon any master."[16]

After expressing the opinion "that an American legislature cannot lawfully require a master to pay a fixed compensation to a servant injured in his employ without regard to the cause of injury," Mr. Randolph further holds that a large measure of systematic compensation may be attained by voluntary methods, and adds that there should be uniformity among the states, of which at present there is no sign.

This discouraging attitude was not held by the committee of the National Civic Federation, who drafted a tentative workmen's compensation bill for uniform state legislation, which is meant to apply to certain enumerated hazardous employments, and provides that no employer shall be liable for any injury for which compensation is recoverable under this act. It applies only to workmen earning less than $1,800 a year, and provides for a graduated compensation for accident and the payment of a lump sum never to exceed $3,000, equal to four years' wages, in case of death. Settlements are permitted by private agreement, but if not so settled an arbitrator is chosen. It expressly reserves the workman's rights to a trial by action at law and before the court without a jury unless either party shall apply to the court for a trial by jury. It provides that the judgment may be either for a lump sum or for periodical payments and gives the right of action to the legal representatives of a deceased workman.

[16]Randolph's Brief, p. 142.

Alternative schemes of settlement are permitted "provided that the scales of compensation are not less favorable to the workmen and their dependents than the corresponding scales contained in this act."

This proposed act, in the opinion of its framers, is an advance upon the New York compulsory compensation law just declared unconstitutional, by giving the workmen additional rights as follows:

1. The bill applies to many more industries than the few dangerous industries under the existing statute.

2. It gives compensation for practically all accidents, while the existing statute gives compensation only for accidents which can be proved to be due to the negligence of the employer or his agent, or to trade risks. The few exceptions under the proposed act, where they exist, must be proved by the employer.

3. The bill limits the option of the injured workman to sue for full damages to cases where the employer is personally at fault and in such cases would revive the full common law conditions and defenses. The existing statute gives the workman a complete option to sue for full damages under existing negligence laws or to take compensation.

4. The bill gives the workman the right to judgment for his agreed compensation under proper conditions. The existing statute provides no means for securing the workman the compensation he has elected and agreed to take.

This bill is submitted by the committee of the National Civic Federation through its chairman, Mr. Sherman, only as a tentative sketch plan and it undoubtedly contains features of great value. At the time of its submission, the decision of the Court of Appeals in the Ives case had not yet been rendered. Bills have been introduced during the winter in the legislatures of West Virginia, of Indiana, and perhaps of other states, complete in themselves, but as they have failed of passage will not now be considered, though each bill is of course a distinct contribution towards the elucidation of the subject. In New Jersey, however, a bill known as the Edge bill has become the law, introducing the principle of contract, either expressed or implied, between the employer and employee for acceptance of the provisions of the act. This agreement is construed to be a surrender by the parties of their rights to any other method of determining the amount of compensation or the

right to compensation. It provides that every contract of hire made subsequent to the time provided for in the act shall be presumed to have been made with reference to these provisions, and unless there be an expressed statement in writing that these provisions are not intended to apply, it shall be presumed that the parties have accepted them and have agreed to be bound thereby. The right to compensation is not defeated by the negligence of a fellow-employee or the assumption of risks inherent in the employment or from failure of the employer to provide safe premises and suitable appliances. A full schedule of compensation is provided for, and jurisdiction for the enforcement of the act is given to a judge of the court of common pleas.

A conference was held at Chicago during November, 1910, of Commissions of the United States, Illinois, Massachusetts, Minnesota, Montana, New Jersey, New York, Ohio, Washington, Wisconsin, Connecticut, the United States Bureau of Labor and the Special Committee of the Conference of Commissioners on Uniform State Laws, to consider subjects involved in a just compensation law. The conclusions of the conference have been summarized as follows:

1. An ideal act should cover all employments.

2. Injuries should be covered (a) irrespective of employers' negligence; (b) irrespective of employees' negligence, except where injury is self-inflicted.

The other questions relating to compensation, as to whether it should be paid in lump sums or installments, the amount and duration of compensation, the distribution among dependents were also discussed and substantial unanimity reached, excepting on the subject of constitutionality. A significant conclusion was that no contribution should be exacted from employees to any compensation fund.[17]

At the request of the National Civic Federation, and in view of the obvious necessity for uniformity of legislation among the states upon the subject, the Conference of Commissioners on Uniform State Laws has appointed a committee whose tentative draft of a statute is not yet ready for public discussion.

The American Federation of Labor has prepared four bills embodying compensation provisions applying to employment

[17]Bulletin of Labor, p 715.

generally, to employees of the Federal Government, to dangerous employments in jurisdictions subject to Federal control, and to persons engaged in interstate and foreign commerce.[18]

The recent decision of the Court of Appeals of New York, to which reference has already been made, will have an important bearing upon any statutes hereafter drawn. It puts the judicial approval upon the objections brought against any compensation scheme where the employer is made liable for accidents or injuries to his workmen in extra-hazardous occupations where the injury was not due to negligence or lack of precaution on the part of the employer. The New York statute provided that if the injury was caused wholly or in part through a necessary risk of the employment, or one inherent in the nature thereof, or through the employer's failure to exercise due care or to comply with any law affecting such employment, the employer should be liable to compensate the injured workman according to the scale fixed in the law.

The court decides the act to be unconstitutional because it seeks to hold a man liable for damages to another which have been incurred without his fault or negligence.

> When our constitutions were adopted, says the court, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law, except as to employers enumerated in the new statute, and as to them it provides that they will still be liable to their employees for personal injury by accident to any workman arising out of and in the course of the employment whch is caused in whole or in part, or is contributed to, by a necessary risk or danger of the employment of one inherent in the nature thereof, except that there shall be no liability in any case where the injury is caused in whole or in part by the serious and wilful misconduct of the injured workman.

> It is conceded that this is a liability unknown to the common law, and we think it plainly constitutes a deprivation of liberty and property, unless its imposition can be justified under the police power * * * *.[19]

The decision then holds that the statute is not a proper exercise of the police power.

[18]Bulletin of Bureau of Labor, p. 701 (1910).

[19]Ives *vs.* South Buffalo Crosstown Railway Co., New York Law Journal, April 3, 1911.

The court treats at length of legislation sustained under the police power, but shows that in order to sustain it, its operation must tend in some degree "to prevent some offence or evil or to preserve public health, morals, safety and welfare. If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is plainly the duty of the courts to declare it invalid, for legislative assumption of the right to direct the channel into which the private energies of the citizen may flow, or legislative attempt to abridge or hamper the right of the citizen to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government.* * *"

But the new addition to the Labor Law is of quite a different character. It does nothing to conserve the health, safety or morals of the employees and it imposes upon the employer no new or affirmative duties or responsibilities in the conduct of his business. Its sole purpose is to make him liable for injuries which may be sustained wholly without his fault and solely through the fault of the employee, except where the latter fault is such as to constitute serious and wilful misconduct.

The court further says:

We cannot understand by what power the legislature can take away from the employer a constitutional guarantee of which the employee may not also be deprived. * * * Conceding as we do that it is within the range of proper legislative action to give a workman two remedies for wrong when he had but one before, we ask by what stretch of the police power is the legislature authorized to give a remedy for no wrong.

In the course of its opinion the court recognizes the entire right of the legislature to abolish or modify the fellow servant rule and the law of contributory negligence and, even to a limited extent, as to the assumption of risk by the employee.

"In the Labor Law and the Employers' Liability Act, which define the risks assumed by the employee, there are many provisions which cast upon the employer a great variety of duties and burdens unknown to the common law. These can doubtless be still further multiplied and extended to the point where they deprive the employer of rights guaranteed to him by our constitutions, and there of course they must stop."

The whole opinion is comprehensive, clear and consistent. It will have a very great influence on the minds of those who are considering the subject.[20] A previous decision in Pennsylvania, where a mine owner was sought to be held liable for accidents arising from the neglect of a foreman, indicates similar views on the part of the Supreme Court of Pennsylvania. [21]

It would seem that workmen's compensation acts, drawn upon the plan of giving an election both to employer and employee either to avail themselves of the plan or their common law remedies, may be sustained, but such acts must not make the employer liable where he has been without fault.

From a study of the cases it is obvious that the solution of the problem of a compulsory compensation act, acceptable both to the employer and the employee and free from constitutional objections, has not yet been discovered. Meantime large corporations, such as the United States Steel Corporation, the International Harvester Company and others are putting in practice with much success the plan of voluntary compensation.

[20]Ives *vs.* The South Buffalo Ry. Co., New York Law Journal, April 2, 1911.

[21]Durkin *vs.* Coal Co., 171 Pa., 193.